No. 78-738

In the Supreme Court of the United States

OCTOBER TERM, 1978

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

RAYMOND N. ZAGONE
KATHRYN A. OBERLY
MARTIN GREEN
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Cases—Continued — Page

Cases—Continued — Page

Statutes and regulations:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-738

KAISER AETNA; BERNICE P. BISHOP ESTATE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 584 F.2d 378. The opinion of the district court (Pet. App. 13a-34a) is reported at 408 F. Supp. 42.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1978. The petition for a writ of

certiorari was filed on November 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a privately-owned fishpond became a navigable water of the United States to which the public has a right of access when it was converted by a private developer into a marina with private mooring facilities for more than 600 boats and with a main channel eight feet deep leading to the Pacific Ocean.

STATEMENT

For hundreds of years prior to 1961, Kuapa Pond, on the Island of Oahu in Hawaii, was used to cultivate mullet. Separated from Maunalua Bay and the Pacific Ocean by a narrow barrier beach reinforced with a stone wall, the pond was fully enclosed and no more than two feet deep. Mullet were seeded in the pond, grown, and harvested. During high tides, sea water from the bay and ocean entered the pond through sluice gates in the barrier, allowing small fish and water to enter but not allowing large fish to escape, thus flushing the pond and enriching the crop (Pet. App. 15a-16a). Such "fishponds" are characteristic geographical features in Hawaii and have provided an important source of food (Pet. App. 3a).

In 1961 the Bishop Estate, owner of the pond and surrounding land, leased 6,000 acres including the pond to Kaiser Aetna for the development of a subdivision and marina called Hawaii-Kai. The plans contemplated that the pond would first be dredged and filled without opening it to the sea; the Corps of Engineers was notified of these plans, and advised Kaiser Aetna that no permit would be required. Later, Kaiser Aetna notified the Corps that it planned to dredge a channel between the pond and Maunalua Bay, and it did so without objection from the Corps (Pet. App. 17a-18a).

Today, the Hawaii-Kai subdivision has approximately 22,000 residents (Pet. App. 18a). The marina and the pond, consisting of 523 acres of surface water and extending approximately two miles inland from the bay (Pet. App. 15a), are used by some 668 boats belonging mainly to residents of the subdivision, but also to 56 non-residents who pay a fee for the right to moor their boats at the marina and to travel across the pond to the ocean (Pet. App. 18a-19a). The average depth of the pond/marina is now six feet, with a main channel of eight feet (Pet. App. 18a). The pond is no longer enclosed and no longer used to cultivate fish. It is intended and used for navigation,[1] and since the channel connecting the marina and bay is unobstructed, the waters of the pond and the

[1] The navigation use has included commercial carriage. Kaiser Aetna owns and operates on the marina a small vessel called the Marina Queen which it has used to carry members of the public for the purpose of attracting them to the marina shoreside and shopping facilities. More than 38,821 persons have ridden the vessel, many of them paying a fee that included the ride and a package of shopping discounts (Pet. App. 19a).

marina ebb and flow with the tides of the Pacific Ocean (Pet. App. 20a).

Petitioners desire to exclude from the pond all persons other than those who are subdivision residents or who rent space at the marina. To this end, petitioners have used patrol boats to intercept and block other vessels from entering the pond.[2] In order to prevent such obstructions, the United States, on behalf of the Corps of Engineers, commenced this lawsuit against petitioners in the district court in 1973. The suit sought a declaration that the waters of the pond are navigable waters of the United States and an order forbidding petitioners from continuing to dredge and fill the pond without a permit from the Corps of Engineers and forbidding them from barring access to the pond by members of the public.

The district court held that the waters of the pond are navigable waters of the United States and therefore, under the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.*, may not be altered, dredged, or filled without the approval of the Corps of Engineers. The court rejected, however, the government's claim of a public right to use those waters. Both sides appealed. The court of appeals upheld the district court's determination that the waters of the pond are

[2] The First Amended Complaint alleged that petitioners used patrol boats to obstruct passage into the pond by members of the public (C.A. App. 11). Petitioners admitted that "[o]nly lessees of marina lots and persons who pay an annual assessment for boating privileges have been allowed to use the waters of the pond. The general public has always been excluded" (C.A. App. 47).

navigable waters of the United States and therefore subject to the Rivers and Harbors Act of 1899, and the court reversed the district court's ruling denying a right of public access to those waters. Petitioners seek review of only the latter holding (see Pet. 2, 15).

ARGUMENT

The petition should be denied because the decision below is correct and because the issue presented is unlikely to recur.

1. All waters which are subject to the ebb and flow of the tides or which are navigable in fact are navigable waters of the United States; as such they are subject to federal regulation and are impressed with a navigation servitude on behalf of the public.

The origins of the public right to navigation are lost in antiquity. The right dates at least from the Roman Empire. Institutes of Justinian, Book 2, Title 1, § 2. It was recognized in Chapter 23 of Magna Carta. See W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 343 (Glasgow, 1914). English common law recognized the public right to navigate rivers and ports. *De Jure Maris* in Hargrave, *Tracts Relative to the Law of England*, pt. 1, ch. 3 at 9 (1787); H. Bracton, *Legibus et Consuetudinibus Angliae*, bk. 1, ch. 12, § 6 at 57 (Twiss ed. 1878). American colonists enjoyed and depended on this tradition: "[F]rom the time of the settlement to the present day, the previous habits and usages of the colonists have been respected, and they have been accustomed to enjoy in common, the benefits and advantages of the navigable waters, for the

same purposes, and to the same extent, that they have been used and enjoyed, for centuries, in England." *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842).[3]

From the earliest days of this country, the federal government has acted to protect the public right of navigation. The final sentence of Article IV of the Northwest Ordinance of 1787, 1 U.S.C. page XLIII, provided:

> The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Similar provisions were incorporated into organic acts admitting at least nine states (but not Hawaii)[4] to the United States. See Leighty, *The Source and*

[3] In arriving at this conclusion, the Court pointed out that King Charles II's charter to his brother, the Duke of York, required the duke to establish for New Jersey a government "as near as might be, agreeable, in their new circumstances, to the laws and statutes of England." "[H]ow could this be done," the Court inquired, "[i]f the shores, and rivers and bays and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish, had been converted by the charter itself into private property, to be parcelled out and sold by the duke, for his own individual emolument?" 41 U.S. (16 Pet.) at 413.

[4] The Hawaiian Organic Act is discussed at pages 12-18, *infra*.

Scope of Public and Private Rights in Navigable Waters, 5 Land and Water L. Rev. 391, 416 n.101 (1970). These provisions have been applied to require clear passage for the public. *Silver Springs Paradise Co.* v. *Ray*, 50 F.2d 356, 358 (5th Cir. 1931); see also *Hamilton* v. *Vicksburg, Shreveport & Pacific R.R.*, 119 U.S. 280, 284-285 (1886); *Huse* v. *Glover*, 119 U.S. 543, 548 (1886); *Leverich* v. *Mayor of Mobile*, 110 F. 170, 172 (1867); *Jolly* v. *Terre Haute Drawbridge Co.*, 13 F. Cas. 920-921 (D. Ind. 1853) (No. 7,441).

To prevent obstructions to navigation, Congress, beginning in 1870, enacted a series of "rivers and harbors" acts that were re-codified in the Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et seq.* That Act confers on the Secretary of the Army broad authority to regulate the nation's waterways in order to keep them open for navigation.[5] See generally *United*

[5] Section 401 prohibits the construction of bridges, dams, dikes, or causeways over or in any port, roadstead, haven, harbor, navigable river or other navigable waters of the United States without the consent of Congress or of the Chief of Engineers and the Secretary of the Army. Section 403 prohibits any obstructions to the navigable capacity of any port, roadstead, haven, harbor, canal, navigable river or other navigable waters of the United States without the prior approval of the Corps of Engineers or Congress. Section 404 authorizes the Secretary of the Army to establish harbor lines beyond which no piers or other works may be constructed. Section 409 makes it unlawful to tie up or anchor vessels so as to prevent passage of other vessels and requires owners to remove sunken vessels. Section 414 authorizes the Secretary of the Army to remove sunken vessels from rivers, lakes, harbors, sounds, bays, canals or other navigable waters.

States v. *Republic Steel Corp.*, 362 U.S. 482, 492 (1960).

The historic right of access to navigable waters and the corresponding power of the federal government under the Commerce Clause to improve, clear, and extend waterways have led this Court to hold repeatedly that navigable waters and the private lands over which they flow are subject to a servitude for public navigation. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation * * *." *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1865); *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 595 (1941).

Because all navigable waters and underlying lands are "subordinate to the public right of navigation," *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 62 (1913), this Court has held that no compensation need be paid to affected landowners for economic losses resulting from exercise of the government's regulatory power over navigable waters. Thus, no compensation need be paid for the loss in water power due to government impairment of the flow to a power company, *United States* v. *Chandler-Dunbar Co.*, *supra*, 229 U.S. at 76; nor for the loss in water power due to the government's raising of the high water mark so as to reduce the head, *United States* v. *Willow River Co.*, 324 U.S. 499 (1945); nor for the loss

of fishing and boating access to a navigable creek that is blocked as a result of federal improvement of another waterway, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391 (1945); nor for the potential value of land as a port site when it is condemned for a lock and dam project, *United States* v. *Rands*, 389 U.S. 121, 123 (1967).

As petitioners note (Pet. 17-18), a 1930 opinion of the Attorney General of the United States did state that Congress could not take over "complete possession and control" of a "wholly artificial" canal without paying compensation. But the opinion also stated that one who makes improvements to navigable waterways "takes the chance that the United States may conclude to exercise its paramount authority under the Commerce Clause * * *," and that such improvements may be completely appropriated without compensation. 36 Op. Att'y Gen. 203, 213, 214 (1930). Kuapa Pond, of course, is not an artificial but a natural body of water (see Pet. App. 8a-9a). And whether or not the United States could appropriate the waterway to its exclusive use, all the United States has done by virtue of the court of appeals' decision here is prevent the obstruction of public navigation.[6]

---

[6] Petitioners do not question the authority of the United States to bring an enforcement action such as this, pursuant to Section 12 of the Rivers and Harbors Act of 1899 (33 U.S.C. 406), to prevent the obstruction of a navigable waterway in violation of Section 10 of that Act, 33 U.S.C. 403. Because this case arises in the context of such a federal en-

While the navigation servitude applies only to "navigable waters of the United States," Kuapa Pond—or Hawaii-Kai Marina—is today a navigable waterway. It is navigable in fact, ebbs and flows with the tides, is used for navigation, has been used by petitioners in commerce (Pet. App. 18a-19a), and forms a continuous highway of sea to Maunalua Bay and thence to the Pacific Ocean and to other states. It thus meets all the tests of a navigable waterway. See, *e.g.*, *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 454-456 (1851); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *Packer* v. *Bird*, 137 U.S. 661 (1891); *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 407, 416 (1940). And

---

forcement proceeding, it does not present the question whether a member of the public could independently rely on Section 10 to obtain access to waters made private by state law. Compare *Vaughn* v. *Vermilion Corp.*, petition for writ of certiorari pending, No. 77-1819, with *Silver Springs Paradise Co.* v. *Ray*, 50 F.2d 356 (5th Cir. 1931), and *Cleveland & Pittsburgh R.R.* v. *Pittsburgh Coal Co.*, 317 Pa. 395, 398 (1935). See also *FPC* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 250-256 (1954) (congressional exercise of the navigation servitude must be explicit).

Although petitioners state that the Corps of Engineers was aware of their dredging and filling operations yet never required a permit or asserted regulatory authority until the early 1970's (Pet. 7), petitioners do not now contend that the United States is estopped to prevent obstructions to navigation in Kuapa Pond. The district court correctly rejected any defense based on acquiescence by the Corps (Pet. App. 33a). See *Louisville Bridge Co.* v. *United States*, 242 U.S. 409 (1917). Petitioners now appear to concede, moreover, that the Corps has jurisdiction to regulate their dredging and filling (Pet. 15).

although the navigation servitude does not extend above the high-water mark, *United States* v. *Rands*, *supra*, 389 U.S. at 123, in the present case the public right of access is not asserted above the high-water mark of the pond but only over the navigable portion.[7] In the absence of a federal permit allowing the exclusion, the public may no more be excluded from the waters of Kuapa Pond than from any other seacoast harbor.

2. Petitioners argue, however, that Kuapa Pond is not a "navigable water of the United States," and hence is not subject to the plenary federal power over such waters, because Hawaii property law and Section 95 of the Hawaiian Organic Act, ch. 339, 31 Stat. 160, allegedly recognize Hawaiian fishponds as private property from which the public may be excluded. The district court, while determining that the public would otherwise have a right of access to Kuapa Pond by virtue of the federal navigation servitude (Pet. App. 24a-25a), agreed with petitioners that the opposite conclusion followed from "the unique legal status of Hawaiian fishponds * * * as strictly private property * * *" under Hawaii law and the Hawaiian Organic Act (*ibid.*).[8]

---

[7] Activities above the high-water mark that affect the course, location, condition, or capacity of a navigable water are subject to regulation under 33 U.S.C. 401.

[8] Petitioners do not argue that the navigation servitude is confined to natural waterways. Compare *Vaughn* v. *Vermilion Corp.*, petition for certiorari pending, No. 77-1819. In any event, Kuapa Pond is a natural body of water. It probably met the legal tests for navigability prior to its development. See,

That conclusion is wrong. The navigation servitude may not be defeated by state law's recognition of title in a private owner. In the first place, there is no inconsistency in recognizing private title to a water bed and private riparian rights while also recognizing that such ownership is subject to certain public easements and servitudes. The navigation servitude does not determine title to the bed or even to the water itself, but simply modifies such title by impressing on it the public right of navigation. At all events, state law cannot erase the federal easement any more than state law can restrict the exercise of other federal authority over commerce. See *United States* v. *Twin City Power Co.*, 350 U.S. 222, 227 (1956); *United States* v. *Chandler-Dunbar*, 229 U.S. 53, 69 (1913); see also *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 173-178 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824).

Petitioners argue that in Section 95 of the Hawaiian Organic Act, ch. 339, 31 Stat. 160, 48 U.S.C. 506, Congress itself recognized and adopted certain customs and laws of Hawaii that petitioners contend preclude a public right of access to fishponds. Section 95 provides:

> That all laws of the Republic of Hawaii which confer exclusive fishing rights upon any person

---

e.g., *The Montello*, 87 U.S. (20 Wall.) 430, 442-443 (1874); *United States* v. *Utah*, 283 U.S. 64, 76, 86-87 (1931); *United States* v. *Appalachian Power Co.*, *supra*, 311 U.S. at 407. It certainly meets those tests today and is still essentially a natural body of water.

> or persons are hereby repealed, and all fisheries in the seawaters of the Territory of Hawaii *not included in any fish pond or artificial inclosure* shall be free to all citizens of the United States * * *. [Emphasis added.]

Petitioners rely on the italicized phrase as demonstrating that Congress excluded Kuapa Pond from the federal servitude making the seawater fisheries of Hawaii "free to all citizens of the United States * * *" (Pet. 12-14). We submit, however, that far from establishing the privacy of petitioners' marina, Section 95 and the Hawaii law on which it was based confirm the correctness of the decision below.

Section 95 gathers meaning from history. In 1848, King Kamehameha III pronounced the Great Mahele, a national land distribution under which large land units (ahupuaa) were allotted to his chiefs (Pet. App. 3a-4a, 17a). An ahupuaa generally ran from the mountain to the sea and included any fishponds within its boundaries (*id.* at 17a). It afforded the chief and his people access to fisheries at the seaside as well as the products of the highlands, such as fuel, canoe timber, and mountain birds and game. *In re Boundaries of Pulehunui*, 4 Haw. 239, 240-241 (1879).

Fishing was a vital occupation for a chief and his people, and customs and laws regulated the allocation of fishing rights among the chief, the people, and the King. See *Carter* v. *Hawaii*, 14 Haw. 465, 470-473 (1902). Anyone was permitted (after 1839) to fish in the ocean outside the coral reefs (*id.* at 471), but

only the landlord and the tenants could fish inside the reef or in fishponds within the ahupuaa (*ibid.*). Fishponds were of three types: (a) loko wai—inland fresh-water ponds normally at an elevation higher than sea level; (b) loko kuapa—shallow ponds formed by building a stone wall into the sea to create an artificial enclosure; and (c) loko pu'u—shallow ponds formed by a natural sand beach between the pond and the sea (Tr. 65-66).[9]

Kuapa Pond, prior to its transformation into a marina and boating area, was essentially of the last type, though the use of a stone wall to reinforce its natural sand bar accounted for its name (Pet. App. 15a-16a & n.3; Tr. 67-69). In addition to the stone wall, sluice gates had been placed in two openings to the pond from Maunalua Bay (Pet. App. 15a-16a). Kuapa Pond was originally under the supervision of the high chief of the ahupuaa and his fishpond guardian (Kiai'i loko) and of the family members who worked the pond (haku'ohana) (Tr. 69). Fish were raised in the pond in two ways. First, the sluice gates allowed spawn to flow in and out of the pond but did not allow large fish to leave. Second, since mullet did not spawn in the fishpond, they were caught outside the pond and planted within it as seed (Tr. 70). Fish were harvested in the pond with the aid of shallow-draft canoes (Pet. App. 16a).

Fishponds thus contained cultivated crops, and it is understandable that Hawaii law recognized the

[9] "Tr." refers to the reporter's transcript of the proceedings in the district court on November 19, 1975.

exclusive right of the cultivators to reap their harvests by excluding the public from such ponds. For the same reason, it is understandable that Hawaii property law treated fishponds as improvements appurtenant to the land, as petitioners observe (Pet. 14). See *In re Kamakana*, 58 Haw. 632, 640 (1978); *Harris* v. *Carter*, 6 Haw. 195 (1877).

When Hawaii was annexed as a territory, Section 95 of the Hawaiian Organic Act, quoted at pages 12-13, *supra*, provided that all laws of the Republic of Hawaii conferring exclusive fishing rights were repealed and that all fisheries in the sea waters of Hawaii "not included in any fish pond or artificial inclosure" were thereafter free to all citizens of the United States. Section 95 thus entitled the public to fish in the sea waters inside the coral reefs, just as the public could already fish outside the reefs. But fishponds and artificial enclosures (loko pu'u and loko kuapa), though they contained sea waters, were excepted from public access.

Kuapa Pond today, however, is not a fishpond or an artificial enclosure any longer. It has been transformed into a marina that is an arm of the sea, and the very purpose of which is to provide access to the sea.[10] For several reasons, the exception provided by Section 95 no longer applies to such a body of water.

First, the intent of Congress in Section 95 was "to destroy, so far as it is in its power to do so, all private rights of fishery and to throw open the fisheries to the

[10] As the district court noted (Pet. App. 20a), "the channel connecting the marina and the bay is unobstructed"—the opposite of a pond or enclosure.

people." *In re Fukunaga*, 16 Haw. 306, 308 (1904);[11] *State* v. *Hawaiian Dredging Co.*, 48 Haw. 152, 187 (1964). Congress intended to open all sea waters to the public with the limited exception of fishponds and other enclosed waters, since they were used for aquaculture. Once the cultivation of fish ceases and the enclosure is breached for connection to the sea, the reason for the exception vanishes and the reasons for the rule of universal access apply.

Second, "[t]he general purpose of [Section 95] and of the following sections, 96 and 97, [was] to put the fisheries of the Hawaiian Islands upon the same basis as those in the United States." H.R. Rep. No. 305, 56th Cong., 1st Sess. 24 (1900). This congressional statement (which is the only statement in the House or Senate Report regarding the relevant language) refutes the notion that Congress intended to treat Hawaiian fishery rights differently from fishery rights in the rest of the United States. It demonstrates an intention to establish in Hawaii the traditional public right of access to the navigable waters of the United States. Thus, once Kuapa Pond ceased to be used as a fishpond and was connected to the sea, it joined the system of navigable waters to which all the public have a right of access.

[11] In *Fukunaga* the landlord of a sea fishery contended that, although Section 95 allowed the public to fish sea fisheries, Section 95 did not repeal a Hawaiian law prohibiting the taking of a certain species designated by the landlord. The Supreme Court of Hawaii held that such a construction of Section 95 was "too narrow," and upheld the right of the public to fish for all species.

Third, insofar as Congress meant to adopt Hawaii law's definition of a fishpond, Hawaii property law itself seems to recognize an exclusive private right of fishery in fishponds only so long as they remain enclosed.[12] While Hawaii property law recognizes traditional fishponds as private property, the Hawaii decisions cited by petitioners (Pet. 14) do not hold or suggest that once a fishpond ceases to be used for aquaculture and is merged with the ocean, it still enjoys its exclusive status. The references to fishponds in those decisions apparently concerned actively farmed fishponds. Hawaii property law seems to hold that a pond remains private only so long as it remains completely enclosed. See *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915) ("[W]hen one captures fish in the public waters and confines them in a private pond, disconnected from the public waters, he acquires an absolute property in them * * *").[13] Indeed,

[12] We do not contend that Congress meant to incorporate the state law definition of a fishpond. We only submit that assuming *arguendo* that Congress meant to do so, Hawaii property law does not recognize as private property a fishpond transformed in the manner of Kuapa Pond.

[13] Of the Hawaii cases cited by petitioners (see Pet. 14), only three have any bearing on fishponds for our purposes. *Murphy* v. *Hitchcock*, 22 Haw. 665, 668 (1915), supports our view that the exclusive right to fish in a fishpond exists only so long as the pond is "disconnected from public waters." *In re Kamakana*, 58 Haw. 632 (1978), and *Harris* v. *Carter*, 6 Haw. 195 (1877), concern the extent to which apparently active fishponds are appurtenant to the land. Furthermore, the 1939 opinion of the Attorney General of Hawaii cited by the district court (Pet. App. 25a n.2) states that "[t]he status of ancient fish ponds fronting on the sea various ahupuaas and ilis have

Hawaii property law has traditionally recognized that "the harbors and channels of this country are government property." *Bishop* v. *Mahiko*, 35 Haw. 608, 647 (1940); *McBryde Sugar Co., Ltd.* v. *Robinson*, 54 Haw. 174, 187 (1973). *Carter* v. *Hawaii*, 14 Haw. 465, 470 (1902); *King* v. *Oahu Ry. & Land Co.*, 11 Haw. 717, 721 (1899).[14] Thus, to the extent that Congress may have intended to incorporate Hawaii property law into the use of the word "fishpond" in Section 95 of the Hawaiian Organic Act, that state law does not support the restrictive reading petitioners now urge.[15]

[sic] not been decided as yet by our highest court." [1933-1939] Hawaii Attorneys General Opinions No. 1689 at 461 (1939). The 1957 opinion of the Hawaii Attorney General, No. 57-159 (1957) (Pet. 8-9), does state that a breach in the sea wall of a fishpond would entitle vessels in distress to trespass in times of emergency, a point that need not be made if the waters are deemed public anyway. But neither opinion, and no previous case of which we are aware, addresses the property status of a fishpond that has been deliberately opened to the sea for navigation purposes, as in this case.

[14] It may also be relevant that under Hawaii law, a developer who sells lots subject to a plat showing them adjacent to proposed streets—or, we assume, waterways—dedicates the latter property to the public. *Hawaii* v. *Ala Moana Gardens*, 39 Haw. 517 (1952).

[15] There is no merit to petitioners' apparent alternative contention that the United States is bound to honor Hawaii's pre-annexation law regarding private rights to fishponds (Pet. 9). Petitioners recognize that their position depends on federal recognition of those rights at the time of annexation (Pet. 10).

In sum, the court of appeals correctly held that Kuapa Pond/Hawaii-Kai Marina is a navigable water of the United States and that the Secretary of the Army therefore has authority, under the Rivers and Harbors Act of 1899, to determine that petitioners' obstruction of public entry into the pond should not be permitted.

3. The issue presented by petitioners is unlikely to recur. Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, makes it unlawful, among other things, "to alter or modify the course, location, condition, or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." The conversion of Kuapa Pond into a harbor affording access to Maunalua Bay, by the dredging of a channel between the two, was an act altering or modifying the "course, location, condition, or capacity" of Maunalua Bay, which is without question a navigable water of the United States. Consequently, a permit under Section 10 of the Act was required although it was not in fact obtained, notwithstanding that petitioners did inform the Corps of Engineers of their plans.

It is the practice of the Corps of Engineers, when issuing a permit under Section 10 of the Rivers and Harbors Act, to include a provision that no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable

waters at or adjacent to the work or structure.[16] Consequently, had the Corps of Engineers exercised over petitioners' project the permit-granting authority that it possessed under Section 10, this case would not have arisen. The Ninth Circuit's decision has done no more than impose on the marina the same condition of accessibility to public navigation that would have been imposed by the Corps if the Corps had exercised its authority when it was apprised of petitioners' plan to construct the marina. Since the Corps proposes to avoid such oversights in the future, the issue presented here is unlikely to arise again in a similar context.[17] There is accordingly no need for review by this Court.

[16] From 1949 to 1969, this requirement was in 33 C.F.R. 209.130(f)(2)(v); from 1960 to 1977, in paragraph p of Appendix C to 33 C.F.R. 209.120, and since July 19, 1977, in paragraph II(b) of Appendix A to 33 C.F.R. 325 (42 Fed. Reg. 37157).

[17] Although petitioners accurately state that there are at least 142 fishponds in Hawaii (Pet. 5), petitioners offer no reason to believe that any of them have been or will be transformed into marinas without permits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

WILLIAM ALSUP
Assistant to the Solicitor General

RAYMOND N. ZAGONE
KATHRYN A. OBERLY
MARTIN GREEN
Attorneys

JANUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285118 278